STATE OF MICHIGAN

COURT OF APPEALS

DONNA TAYLOR, as Personal Representative of the Estate of ELLA VIRGINIA COTTERMAN, Plaintiff-Appellee,	UNPUBLISHED February 15, 2005
v	No. 251126 Washtenaw Circuit Court
VILLAGE OF CHELSEA, Defendant-Appellant.	LC No. 02-001115-NO

Before: Talbot, P.J., Whitbeck, C.J., and Jansen, J.

PER CURIAM.

Defendant appeals as of right from the trial court order denying its motion for summary disposition that was sought on the basis of governmental immunity. We reverse. This case is being decided without oral argument under MCR 7.214(E).

As an initial matter, plaintiff indicates that this Court does not have jurisdiction over this appeal because the trial court did not rule that defendant lacked governmental immunity, but rather that there was a factual question to be resolved by a factfinder at trial as to the applicability of governmental immunity. This relates to defendant having filed a claim of appeal, i.e., asserting entitlement to appeal as of right from the trial court's denial of its motion for summary disposition. This Court has jurisdiction over an appeal of right filed by an aggrieved party from a "final judgment" or "final order" of a circuit court. MCR 7.203(A)(1). MCR 7.202(7)(a)(v) defines a "final judgment" or "final order" in a civil case to include an "order denying governmental immunity to a governmental party." In *Newton v Michigan State Police*, 263 Mich App 241, 256-259; 688 NW2d 94 (2004), which was decided after the filing of the parties' briefs in the present case, this Court held that, under this definition, the defendant was not entitled to appeal as of right an order denying its motion for summary disposition based on governmental immunity where the denial was predicated on the existence of a material factual dispute as opposed to a legal determination regarding an entitlement to governmental immunity. In other words, under *Newton*, a governmental party is only entitled to an appeal as of right based on MCR 7.202(7)(a)(v) if a circuit court definitively rules as a matter of law that it lacks governmental immunity with regard to a matter, not where a circuit court denies the governmental party's motion for summary disposition based on a conclusion that a factual issue needs to be resolved to determine the applicability of governmental immunity. Because the trial court's denial of defendant's motion for summary disposition in this case was premised on the existence of a factual dispute as to whether the passageway at issue is an alley, rather than a

definitive holding that defendant was not entitled to governmental immunity, defendant is not entitled to an appeal of right at this point.

However, despite its conclusion that that the defendant in that case lacked entitlement to an appeal of right, the *Newton* panel chose to treat its defective claim of appeal as an application for leave to appeal and to grant leave and consider the substantive issue in that case. *Newton, supra* at 259. This Court took that action in light of the plaintiff's failure to move to dismiss the claim of appeal and the fact that there had not been a definitive guide to interpretation of the relevant court rule provisions. *Id*. Similarly, in the present case, plaintiff did not file a motion to dismiss defendant's claim of appeal and the resolution of the underlying jurisdictional issue by *Newton* did not occur until after the filing of the parties' briefs in the present case. Further, as will be discussed below, it is apparent that defendant is entitled to governmental immunity in this case. Accordingly, definitive resolution of the case by this Court, at this stage, avoids the waste of judicial resources and expense to the parties that would be entailed by a continuation of extended trial court proceedings if this appeal were simply dismissed. Thus, we treat defendant's claim of appeal as an application for leave to appeal, grant it, and resolve this appeal on the merits.

Defendant argues that the trial court erred by denying its motion for summary disposition because it is beyond reasonable dispute that the passageway at issue is an alley and, thus, outside the scope of the highway exception to governmental immunity. We agree.

A trial court's decision regarding a motion for summary disposition is reviewed de novo. *Newton, supra* at 260. Because the trial court's rationale for denying the summary disposition motion was based on the existence of a factual dispute, it constituted a ruling under MCR 2.116(C)(10). *Newton, supra* at 257. Accordingly, this Court reviews the evidence in the light most favorable to the nonmoving party to determine whether there is a genuine issue of material fact. *Id*. at 260.

As a governmental agency, defendant is generally immune from tort liability. MCL 691.1407(1).[1] However, MCL 691.1402(1) establishes the highway exception to governmental immunity (on which plaintiff relies) under which a governmental agency is potentially liable for failing to keep a "highway" under its jurisdiction in reasonable repair. The relevant statutory definition of the term "highway" is provided by MCL 691.1401(e), which states:

> "Highway" means a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway. *The term highway does not include alleys*, trees, and utility poles. [Emphasis added.]

There is no applicable statutory definition of the term "alley." An undefined statutory term should be given its plain meaning, and it is proper to consult dictionary definitions.

[1] As a political subdivision of the state, defendant village is a "governmental agency." MCL 691.1401(d).

Halloran v Bhan, 470 Mich 572, 578; 683 NW2d 129 (2004). The two pertinent definitions of "alley" in a common dictionary are as follows:

> 1. a passage, as behind a row of houses, permitting access from the street to backyards, garages, etc. 2. a narrow back street. [*Random House Webster's College Dictionary* (1997), p 35.]

We consider it apparent that these definitions conform with the typical understanding of an alley in the present context.

We conclude that effectively uncontradicted evidence establishes beyond reasonable dispute that the passageway at issue is an alley. A former village manager stated in an affidavit that the passageway "does not have any type of name or designation." The plat for the area expressly labels the passageway simply as an "alley" and indicates that it is to be only two rods long. Importantly, the passageway as shown on the plat is located entirely between two parallel rows of lots in one block, and the passageway is parallel to the two named streets (Middle Street and South Street, which has undisputedly been renamed Harrison Street) on which those lots are situated. Indeed, even the photographs of the area offered by plaintiff in opposition to defendant's motion for summary disposition show that the passageway amounts to a quite narrow paved strip that is situated between the back area of the lots on each side of it. Thus, it is readily apparent that the passageway is an alley within both dictionary definitions of that term as either a passage allowing access from the street to the backyards of the adjoining lots or as a narrow back street. Reasonable persons would have to regard the passageway as an alley based on the common usage of the term. Accordingly, the trial court erred by failing to grant defendant's motion for summary disposition because, as an alley, the passageway is outside the scope of the highway exception to governmental immunity. See *Ward v Frank's Nursery & Crafts, Inc*, 186 Mich App 120, 126; 463 NW2d 442 (1990) (holding the defendant city to have met its burden of showing that a passageway was an alley where "nothing is asserted that suggests that the alley was otherwise used in any manner inconsistent with the generally understood notions of an alley").

Plaintiff places considerable reliance on statements in an affidavit from a person residing in a home on the relevant block indicating that the building in which that person lives is a multi-family dwelling with four apartments and that the only access to three of those apartments is along the disputed passageway and that similarly a house next door to that residence is divided into three apartments with two of those apartments having entrances along the passageway. But the fact that these homes have been subdivided into apartments is immaterial to the character of the passageway as an alley. Given that the alley is unnamed and the photographs showing the character of the area, it is evident that the overall front of these homes is on the named streets that run parallel to the alley. That individual apartments within those homes might in a sense "front" on the passageway cannot reasonably be considered to change the fact that the passageway is located along the back of the relevant lots and, accordingly, that the passageway is an alley.

Also, plaintiff is incorrect in indicating that the apparent fact that people who live on both sides of the passageway use it to reach garages because they are not allowed to park their cars on Harrison or Middle Streets between 3:00 a.m. and 6:00 a.m. means that the passageway is not an

alley. To the contrary, the fact that the alley is used to reach garages at the back of the residences is a strong hallmark of the character of the passageway as an alley.

Further, contrary to plaintiff's possible indication, it is not enough to remove the passageway from being an alley if it is true, as plaintiff indicates, that some people used the alley to drive through from one street to another street. See *Collins v Ferndale*, 234 Mich App 625, 630; 599 NW2d 757 (1999) (indicating that use of an alley "by persons traveling between the two side streets who were not using any of the businesses alongside the alley" did not render the alley a highway). Given the layout of the streets in the area, one could not reasonably expect those who do not reside in the relevant block to typically use the passageway in that manner or for the passageway to be used by relatively large amounts of traffic as one would tend to expect of an ordinary street. Also, the dictionary definition of alley allows for it to be a "narrow back street" which means that some use of the passageway by drivers generally is not inconsistent with its character as an alley. Similarly, contrary to the possible implication of plaintiff's brief, as a matter of common experience, many alleys are not marked as being limited to one way traffic, but rather cars are allowed to traverse many alleys in both directions.

Plaintiff's argument that the ten mile per hour speed limit signs that were undisputedly posted along the passageway reflect that it is not an alley because such traffic control signs are not placed in alleys "since there is no traffic on alleys" is simply flawed. Indeed, as discussed above, typical alleys are made so that a car may drive on them to access the rear of buildings—meaning that there is some traffic on alleys. A speed limit sign intended to slow the speed of cars on the alley is consistent with this fact. With regard to plaintiff's argument to the effect that state law only authorizes a village to post speed limit signs on streets so that defendant's posting of speed limit signs means that the passageway must be a street as opposed to an alley, we seriously question the implicit premise that a village needs some type of explicit authorization by state law to lawfully post a speed limit sign along an alley that it owns. But there is no need to resolve that point. Even if the ten mile per hour speed limit signs in question were illegally placed, such an impropriety would not change the character of the passageway as an alley, but would simply mean that the speed limit signs were improperly posted on that alley.

We reverse the trial court's denial of defendant's motion for summary disposition and remand the case for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Kathleen Jansen